UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.567
9 November 1995

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD OF THE 567th MEETING

Held at the Vienna International Centre, Vienna
on Tuesday, 16 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

CONTENTS

Electronic data interchange: draft Model Law (*continued*)

Article 5
Article 6

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of distribution of this document* to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.95 59213 (E) [illegible]

Distr.: 22 November 1995

The meeting was called to order at 9.40 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (*continued*) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-Add.4)

Article 5

1. **Mr. SORIEUL** (Secretariat), introducing article 5 (A/CN.9/406, annex), said that paragraph (1) expressed what the Working Group had agreed upon as an objective definition of the minimum functional equivalent of a paper-based writing, based on the concepts of accessibility and subsequent reference. Paragraph (2) was intended to indicate to implementing States that they should ascertain whether exceptions were required and, if so, state them.

2. **Mr. BONELL** (Italy) said that he felt that the wording of article 5 was too technical and not readily understandable to a non-expert. Article 1.10 of the UNIDROIT Principles of International Commercial Contracts defined the term "writing" as "any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form". He realized that the Working Group had considered but rejected similar formulations. He nevertheless thought that simpler, more analytical and more descriptive language as in the UNIDROIT definition should be used. In the drafting of those Principles, account had been taken not only of the Working Group's previous drafts but also of existing international instruments, such as the UNCITRAL Model Law on International Commercial Arbitration, the United Nations Terminal Operators Convention and the UNIDROIT Conventions on International Factoring and International Financial Leasing.

3. **Mr. ABASCAL ZAMORA** (Mexico) said that his delegation could partly go along with the suggestion made by the representative of Italy. The concept of a writing as a mode of communication that "preserves a record of the information contained therein" had a certain tradition and could be found in several international instruments. Such a formula could be adopted, but he was not in favour of deleting the reference to accessibility for subsequent reference.

4. **Mr. ANDERSEN** (Observer for Denmark), agreeing with the remarks made by the representative of Mexico, said that it was unreasonable to expect that a provision which related to a complex technical area should be easily understandable to an outsider. The concept of accessibility had a definite meaning in the technical world, which was where any legal problems arising from the provision in paragraph (1) would come up. The paragraph should therefore be left as it stood.

5. **Mr. ALLEN** (United Kingdom) said that the problem of the precise meaning of "accessibility" in article 5 (1) might be solved by including a definition of the term "accessible" in article 2, on the following lines: "'Accessible' means available in a form in which it is capable of being displayed", retaining the term in article 5, and substituting it for the word "displayed" in article 7, paragraph (1) (a). That would also meet the wishes of those delegations that thought it would be useful to have the same language in both articles 5 and 7.

6. His delegation felt it was essential that the requirement for writing should be satisfied only as from the date when the relevant data message was generated. As currently drafted, article 5 meant that a subsequent data message could satisfy the requirement retrospectively, which was not the intention. One possible remedy could be to insert after the words "data message" the phrase "generated at the relevant time".

7. **Ms. BOSS** (United States of America) said that the Commission should guard against taking decisions in the guise of clarifying language when they might adversely affect policy decisions taken earlier. The question of what was meant by accessibility had been much debated in the Working Group, which had, for example, rejected the notion of a display requirement, on the ground that, in an electronic context, information was not displayed to humans but was processed by machines. That was why the formulation adopted referred to accessibility for future use, but without specifying any limitation as to the type of use. She would be reluctant to pursue the attempt to define "accessibility", because of the difficulty of reintroducing requirements that had earlier been rejected.

8. Unlike the United Kingdom representative, she did not consider that article 5 involved a timing requirement. If there was a requirement that a writing be produced contemporaneously with a given transaction and the data message was recorded after the time of that transaction, the writing requirement would be satisfied by the data message, but the contemporaneity requirement would not. Perhaps the matter could be made clear in the draft Guide to Enactment.

9. Her delegation felt that the notion of "a rule of law" was possibly too restrictive. In some legal systems, it meant statutory rules, as opposed to judicially created rules or rules of court or of procedure. Therefore, the phrase "Where a rule of law requires ...", appearing at the beginning of articles 5, 6 and 7, might be replaced by the words "Where there is a requirement that ...". That was simply a drafting issue, which she wished to raise for purposes of clarification.

10. **Ms. de LA PRESLE** (France) said that in her delegation's view the concepts of accessibility and subsequent reference were clear, even to a non-specialist, and should therefore be retained. If further clarification was necessary, it should be explained in the draft Guide that accessibility could be assessed either in relation to a human operator or to a machine.

11. She agreed with the United States representative's remarks concerning the United Kingdom proposal for the establishment of a link between the data message and the time of its creation. The concern expressed was nevertheless a legitimate one. A possible solution might be to employ a formulation which referred to the faithful reproduction of what the parties had exchanged, as in the proposal submitted by France (A/CN.9/409/Add.3). Such a reference would make it possible to avoid the concepts of conformity and identity, which had presented problems in connection with the requirement of an original.

12. Regarding the view that the term "a rule of law" might be too restrictive, she would suggest that a reference be added to "usage"; that would broaden the concept, while at the same time make it possible to determine the origin of the requirement. A requirement should not be able to come in an arbitrary fashion from any party to the transaction. The text of article 5 (1) might then read: "Where a law or usage requires a writing, the message shall be considered to have legal validity provided that it faithfully reproduces what the parties exchanged and that it is recorded in an intelligible and reproducible form".

13. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) said that the current text of paragraph (1), which was the result of lengthy discussions in the Working Group, clearly reflected the two notions of a legal requirement and accessibility for subsequent reference, which should be maintained.

14. **Mr. GRIFFITH** (Australia) said that his delegation felt that there was an inconsistency between articles 5 and 7 on the question of presentation, since article 7 contained a display requirement, while article 5 did not. Perhaps the Commission should take up the matter when discussing article 7.

(*Mr. Griffith, Australia*)

15. With regard to the proposed inclusion of a definition of "accessibility", he supported the view expressed by the representative of the United States of America. It would be better to leave the text as it was.

16. Concerning the United Kingdom representative's proposal for the addition of a reference to "relevant time", he shared the opinion of the United States representative that the text was not concerned with a timing requirement. He also believed that, at least in common-law systems, the writing requirement would be satisfied for statute-of-fraud provisions if the writing was created subsequently. For those two reasons, he felt that a reference to timing should not be included in the text.

17. **Mr. MADRID** (Spain), agreeing with the representative of the Islamic Republic of Iran, said that the current formulation of paragraph (1) adequately described the concept of a writing. The requirement, as expressed, could apply to a paper-based writing, or to a writing in electronic or any other form. The text should consequently remain as it stood.

18. With regard to the notion of "a rule of law", that concept was sufficiently broad in the Spanish legal system and no modification would be required.

19. **Mr. ANDERSEN** (Observer for Denmark) said that he supported the view that article 5 should remain unchanged. The phrase "capable of being displayed" in the United Kingdom representative's proposed definition would call for further clarifications and create additional problems. The display requirement contained in article 7 dealt not with whether information was capable of being displayed, but rather with the time when it was displayed. The time of display was not a matter of doubt. Any necessary explanations should be included in the draft Guide rather than in the draft Model Law.

20. **Mr. UCHIDA** (Japan) said that the amendment of "a rule of law" proposed by the United States representative implied that the writing requirement could be imposed by agreement between the parties. He felt that the intention of article 5 was to remove legal obstacles. Therefore the phrase "a rule of law" should be retained, or possibly amended to just "a law".

21. **Ms. REMSU** (Observer for Canada) also favoured retaining article 5. In her view, the notions of accessibility and subsequent reference could be adequately interpreted with supplementary explanations in the draft Guide. The notions of timing and faithfulness were not part of the concept of the functional equivalent of a writing and should not be included. She also agreed with the remarks just made by the representative of Japan. The text was concerned with the removal of legal impediments.

22. **Mr. BONELL** (Italy) said that he agreed with the remarks of the representatives of Japan and Canada. The term "rule of law" should be retained. The text before the Commission was that of a model law; the precise meaning of terms therefore had to be left to national legislators.

23. **Mr. ALLEN** (United Kingdom) said that he had not intended that article 5 (1) should include a timing requirement. The text simply required a drafting amendment so that it would not allow any data message, whenever generated, to satisfy the requirement of a writing. As an alternative to his earlier proposal, he would suggest that the words "a data message satisfies" be replaced by "a data message can satisfy". That would be neutral as to the time of creation of the message.

24. **Mr. GRANDINO RODAS** (Brazil) said that he favoured keeping article 5 as drafted and including explanations in the Guide.

25. **Mr. SCHNEIDER** (Germany) agreed with the representative of Italy. The article needed redrafting, as it was grossly misleading. There were many different interpretations of the rule, as was evident both from the discussion in the Commission and from the comments made by the Banking Federation of the European Union (A/CN.9/409). There were two functions for which the law required writing: for purposes of evidence, and as a "red flag", giving a warning to the parties to the contract. As now drafted, it was not clear whether the article dealt with both types of functions, or only the first. In his opinion, it dealt only with the first, in view of the last phrase of paragraph (1); the Banking Federation, on the other hand, interpreted it as referring to the second. The article should be redrafted to limit it only to those legal requirements where writing was necessary for evidential reasons. Something could be added to that effect in the title, or the idea could be expressly stated in the Guide.

26. **Mr. SORIEUL** (Secretariat) said that none of the functions of a writing was excluded for the functional equivalent of a writing. The article was not intended to make a distinction between whether the writing was required for evidential reasons or as a warning, or even "*ad solemnitatem*", for a legal transfer. Rather, it was designed to provide for an equivalent for writing in general, while in paragraph (2) giving States the possibility of excluding the implementation of paragraph (1) in all cases where a paper-based writing, and not a functional equivalent, was required.

27. **Mr. CHAY** (Singapore) said that he did not support the notion of including a display requirement in the concept of accessibility, but favoured keeping the article as it stood. As to the proposal by the United Kingdom to use the phrase "can satisfy" with regard to data messages, the Model Law was intended to give EDI messages the same basis and standing as paper documents, and therefore definite rules were needed to say that they would be equally admissible. If uncertain terms such as "can satisfy", were introduced, then the intention of the Model Law would be defeated.

28. **Mr. ABASCAL ZAMORA** (Mexico) said that according to the interpretation given by the representatives of Japan and Canada, the notion of "a rule of law" did not include situations in which the parties to a contract had stipulated that there must be a writing, e.g., in order to amend or terminate a contract. Such a stipulation was not, in their view, binding under a rule of law and was not covered by article 5. If that were so, what would happen if there was electronic communication between the parties to a contract containing no definition of writing? The parties would not be able to avail themselves of the definition of writing under article 5 and would consequently not be protected by the Model Law. In his interpretation, however, the requirement to fulfil a contract was a universal rule of law, and hence in cases where the parties had agreed to communicate or to perform certain acts in writing, they were also bound by a rule of law.

29. **The CHAIRMAN** said that the representative of Mexico had raised a new issue and that the Commission might wish to consider whether the Model Law ought to deal with it. As he understood it, if the parties to a contract stipulated, say, that notice must be given in writing, they could also add a provision stating that notice could be given by a computer-generated message, which would solve the problem.

30. **Mr. ABASCAL ZAMORA** (Mexico) said there were many cases in which the parties required writing but did not specify anything about electronic communication. If no reference was made to such forms of communication, the Model Law would not be protecting the parties to such contracts, nor would it be promoting the use of electronic means of communication.

31. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that as pointed out by the representative of Germany, there were two functions of writing. Paragraph (1) of article 5 covered both of those functions, as it was couched in general terms. The use of the phrase "can satisfy", as proposed by the representative of the United Kingdom, might cast doubts on the status of a data message: either the message was a substitute for writing, or it was not. Article 5 spoke only of writing requirements and had nothing to do with the ability to consider whether other conditions were fulfilled, such as in cases of error or fraud. For those reasons, article 5 should be kept as it stood.

32. **Mr. BURMAN** (United States of America) said that he could go along with the consensus on retaining article 5 as it stood, but would like the interpretation of the phrase "a rule of law" to be put into the Guide. In his country's jurisprudence, which was based not just on codes of law but also on judicial decisions, that phrase would be interpreted very narrowly, much more so than in other countries. Accordingly, the Guide should indicate that, where appropriate, a rule of law included judicial requirements. Perhaps a reference could also be included to party autonomy with respect to the term "writing". In the existing draft, party autonomy applied to chapter III but not to the body of law at present under discussion. In practice, however, many contracts were drawn up without close attention to the provisions of the law. Thus, the parties, having included a requirement about presentation in writing, might in fact have no objection to a subsequent communication in some other mode, but might find acceptance of such communication arbitrarily excluded under the Model Law. Adding an appropriate reference in the Guide would enable the Model Law to cover a broader range of actual commercial practice.

33. **Ms. ZHANG Yuejiao** (China) said that the article should be retained in its present form but a specific explanation given in the Guide to ensure uniform interpretation, application and acceptance of the Model Law. As to the term "a rule of law", its scope should be defined to cover cases where the judicial system required evidence to be in writing as well as cases where the writing requirement was that agreed to by the parties concerned. Furthermore, an explanation was also needed as to whether the Model Law should have a retroactive effect. Some legal systems might have no such requirements with regard to a data message, and contracts drawn up prior to the introduction of data messages which had required presentation in writing would then not include EDI messages. If parties wished to commit themselves to including EDI messages, they should so stipulate in their agreement. Regarding the explanation to be added on the word "accessible", the Commission should consider the Working Group's proposal and emphasize that the information had to be accessible in tangible form in order to be consistent with the rules of UNCITRAL.

34. **Mr. SHIMIZU** (Japan) said that the word "accessibility" would be difficult to translate into Japanese. It would thus be helpful if a definition were included, either in the text itself or in the Guide.

35. **Mr. MADRID** (Spain) said that the Guide should explicitly state that the reference to a rule of law in article 5 also covered those cases where the obligation of a party derived directly and immediately from a contractual relationship. It might also derive indirectly from a law, but whatever the more remote source of the obligation, if it originated in a contractual relationship, article 5 would also apply. Where there was not a relationship between commercial parties but where, rather, the obligation derived from an access contract—such as one which set forth the conditions applying to intermediaries providing services through their communication networks—if a writing was required, the provisions of article 5 should also apply. Regarding the question raised by the representative of China as to whether the Model Law would have a retroactive effect, he considered that, as in the case of a pre-existing rule of law, if the obligation arose from a pre-existing contractual relationship, the Model Law would also apply.

36. **The CHAIRMAN** said that he took it that the consensus was to retain article 5 as drafted. As to the question raised by the representative of the United States of America about whether the reference to "a rule of law" covered case law, perhaps it could be made clear in the Guide that it did. A new problem which had been raised was whether a contractual stipulation for a writing could be satisfied by a data message. To include such a provision in article 5 would extend its scope. He asked whether there was support for the proposal made by the representative of Mexico to that effect.

37. **Mr. BONELL** (Italy) said that if the parties required a writing without specifying what that meant, it would be necessary to refer to the existing legal definition of writing. He asked whether it could be assumed that as soon as the Model Law was adopted, parties all over the world would immediately wish to be bound by it. They might already have drawn up contracts stipulating that a writing must be in paper form, and might not wish to accept substitution of a data message. If EDI was to be recognized as a valid means of communication equivalent to writing, it would have to be expressly accepted by the parties.

38. He pointed out that there was one definition of "writing" in article 5 of the draft Model Law and another of "form" of document in article 7 of the draft Convention on Independent Guarantees and Stand-by Letters of Credit (A/CN.9/408). The language used throughout the Commission's work should be consistent.

39. **The CHAIRMAN** pointed out that the Model Law dealt with an entirely different subject from letters of credit.

40. **Mr. ABASCAL ZAMORA** (Mexico) said that, in commercial law, the writing requirement was not necessary as a rule. The simple agreement of the parties created commercial obligations, in which the writing requirement usually arose from contractual stipulations. To exclude such stipulations from the definition of writing was to neglect a very important part of the Commission's mandate, namely, to facilitate the use of EDI and related means of communication in trade.

41. **Mr. CHOUKRI SBAI** (Observer for Morocco) said the article was concerned with the case where the requirement derived from a rule of law. Contractual stipulations were a matter for the parties to decide; obviously, the parties which had agreed to undertake their transactions through the use of computers could not reject data messages. There was therefore no need to refer to contractual stipulations in the draft text.

The meeting was suspended at 11.10 a.m. and resumed at 11.45 a.m.

42. **The CHAIRMAN** said that he felt the consensus of the Commission to be in favour of retaining article 5. Though some changes had been proposed, they had not in his opinion elicited sufficient support. However, one particularly interesting problem had been raised as to whether article 5 should cover situations where the parties to an agreement stipulated in their agreement that something must be in writing. It was a new issue that had not been addressed by the Working Group. He proposed that the Commission return to the question after its consideration of articles 6 and 7, and possibly 10 and 11, in order to decide whether or not it wished to include a provision on that subject. On that understanding, he took it that article 5 was acceptable as it stood.

Article 6

43. **Mr. SORIEUL** (Secretariat) said that article 6 had a similar structure to article 5. After many discussions, the Working Group had decided that article 6 should concentrate on the essential elements of the signature, which served to identify the originator and to indicate the agreement of the originator regarding the information contained in the message. Those two functions had been expressed in paragraph (1) (a). The use of a functional equivalent of the signature presupposed a method to determine the identity of the originator and that originator's approval of the information contained in the message. The Working Group had decided that paragraph (1) (b) should contain a general provision rather than specific criteria of reliability, considering it preferable to incorporate such criteria in the Guide rather than in article 6 itself.

44. **Mr. CHAY** (Singapore) said that the signature requirement in article 6 was satisfactory so long as there existed a reliable method of identifying the originator of the message. Singapore therefore proposed that the criteria set out in document A/CN.9/409 and numbered (i) to (v) should be incorporated into the draft Guide. Singapore had originally wanted them to be included in article 6 itself but had noted that certain other criteria had been listed in paragraph 71 of the Guide after adoption by the Working Group at its twenty-ninth session, which Singapore had unfortunately been unable to attend.

45. **Mr. BURMAN** (United States of America) considered that, in the proposal by Singapore, factors (ii), (iii) and (iv) were highly appropriate, but factors (i) and (v) should not be included, because they would create problems in commercial law. The question of "relative bargaining positions" — the subject of (i) — was best left to other aspects of the legal system if adjustments were felt to be necessary; modern economic and legal thinking was tending to move away regarding such considerations as belonging to the context of commercial law. As for factor (v), use of the best available technology was always encouraged, but such technology was often expensive, or required special training or new equipment. Even where better technical methods were available, commercial parties sometimes consciously decided not to use certain advanced technologies. In other cases, where extremely high security was the priority, more advanced technology might be required. Such decisions must be left to the parties concerned in a transaction. In his view, it was important to exclude factors (i) and (v).

46. **Mr. ANDERSEN** (Observer for Denmark), **Mr. ABASCAL ZAMORA** (Mexico), **Ms. EKEMEZIE** (Nigeria) and **Mr. SCHNEIDER** (Germany) also thought that factors (ii), (iii) and (iv), but not (i) and (v), should be included in the Guide.

47. **The CHAIRMAN** said he took it that the Commission accepted the Singapore proposal as amended by the representative of the United States.

48. **Mr. ALLEN** (United Kingdom), referring to the concept of "agency", said that difficulties might arise because the definition of an "originator" given in article 2, paragraph (c), appeared to mean that in the case of a message generated on behalf of another person, the originator was the principal rather than the agent through whom the message was sent. Hence in article 6, paragraph (1) (a), the method used should identify the principal rather than the agent. If, for example, the relevant requirement in law was for the signature of a company director or secretary, it was important that it be the signature of the person concerned; it was not enough to say that the document was signed on behalf of the company. In his view, all that was needed was a minor drafting change that would not alter the intention behind the text. He proposed that the beginning of the article should read as follows:

(*Mr. Allen, United Kingdom*)

"(1) Where a rule of law requires the signature of any person, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:

(a) A method is used to identify that person in the data message as the originator or as a person acting on its behalf and to indicate that person's approval of the information contained therein; ..."

The suggested text would make it possible to use an electronic signature that identified the agent to satisfy the requirement to identify the signature of an agent, e.g. a company director, and show that agent's approval of the information contained in the message. From then on, ordinary agency principles would apply: the approval of the agent would automatically represent approval of the principal and would enable the electronic signature of a company to meet the signature requirement in cases where the national law concerned recognized the concept of signature by a corporate person. That was not the situation in the United Kingdom, where a signature had to be by an individual.

49. **Mr. BURMAN** (United States of America) said that his delegation would need more time to consider the United Kingdom proposal.

50. **Mr. CHOUKRI SBAI** (Observer for Morocco) considered that the United Kingdom proposal was extremely useful, since it would help to solve a practical problem. Under the Moroccan legal system, as under that of the United Kingdom, a signature had to be handwritten. Banks in Morocco did use electronic signatures as well, but they were not accepted by the courts. It was therefore important in article 6 to deal with the idea of agency.

51. **Mr. SCHNEIDER** (Germany) said that a clear distinction must be drawn between the policy of the rule in article 6 and the problems created in an agency situation. With regard to the policy of the rule, it was important to distinguish why the law required a signature. There were two possibilities: the law might require a signature for evidential purposes, or for other reasons, e.g. to fulfil the "red flag" function. In his view, article 6 dealt only with a situation in which the rule required a signature for evidential reasons. If, as at the moment, the interpretation as to whether the approval had to be given in written form or orally was left open, his delegation could accept article 6 as it stood.

52. In German law there was no question of agency when an employee, e.g., in the computer department, acted on behalf of the director of a company. He considered that such cases should be left to the relevant domestic law.

53. **Ms. EKEMEZIE** (Nigeria) said she found the United Kingdom proposal interesting, but in view of its possible impact on other articles would like to have time to think about it.

54. **Ms. BOSS** (United States of America) noted that the representative of Germany had raised questions as to the application of article 6 (1) (a) and mentioned some problems that might be dealt with by minor redrafting. The first was the concept in paragraph (1) (a) of a method used to identify the originator. One significant point about a signature in most jurisdictions was that it was affixed by the person who did the signing. The person signing a letter undertook the identification, or adopted a machine signature or a

(*Ms. Boss, United States of America*)

letterhead as his signature. There might therefore be a need to change the phrase "a method is used to identify the originator" to "a method is used by the originator" or "a method is adopted by the originator", to make it clear that it was the originator who used or adopted the method.

55. The concept of approval might be elusive, since it might give rise to an inquiry as to whether the originator considered and then approved the content of the message. Some of her delegation's correspondents had in fact suggested a slightly different wording, namely, "is used to associate the originator with the information contained therein" instead of "indicating the originator's approval".

56. **Mr. MADRID** (Spain) was in favour of maintaining the present wording of article 6 (1) (a), perhaps with minor drafting changes. The question of agency should not be introduced into the wording, as proposed by the United Kingdom representative, since complex issues might arise because of differences between legal systems. There was no need to make the question of signature more complicated.

57. Moreover, although he was not familiar with the use of electronic signatures, he understood that what was important in such signatures was not the person who physically operated the computer, but the person identified by the electronic signature, who might be a legal entity.

58. **Mr. CHOUKRI SBAI** (Observer for Morocco) still considered the United Kingdom proposal very useful, precisely because persons signing were executives or managers and the relationship between a manager and his company was that of an agent.

59. However, the term "person" in the United Kingdom proposal could be misleading and would have to be defined. It would replace the term "originator", which was defined in article 2. He therefore proposed that the wording in paragraph (1) should be maintained, since a signature by definition had to be made by a person, and to amend subparagraph (a) to read: "a method is used to identify the originator of the data message or whoever represents him and to indicate the approval of the originator or whoever represents him of the information contained therein".

The meeting rose at 12.35 p.m.